Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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CASE NO. 85-1074

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

STATE OF FLORIDA,

Petitioner,

vs.

JERRY HALIBURTON,

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

PETITIONER'S BRIEF IN REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	1
CONCLUSION	8

TABLE OF AUTHORITIES

	Page
Caldwell v. Mississippi, 472 U.S. ___, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985)	7
Carter v. Kentucky, 450 U.S. 288 (1981)	6
Brewer v. Williams, 430 U.S. 387, 398 (1977)	4
Burbine v. Moran, 753 F.2d 178 (1st Cir. 1985) cert. granted Moran v. Burbine, ___ U.S. ___, 105 S.Ct. 2319, 85 L.Ed.2d 838 (1985)	1,2
Escobedo v. Illinois, 378 U.S. 478 (1964)	4
Exxon Corporation v. Eagerton, 462 U.S. 176, (1983)	6
Illinois v. Gates, 462 U.S. 213 (1983)	5-6
Milton v. Wainwright, 407 U.S. 371 (1972)	8
Miranda v. Arizona, 384 U.S. 436 (1966)	1,3,4
Sandstrom v. Montana, 442 U.S. 510 (1979)	6

TABLE OF AUTHORITIES (CONT.)

	Page
State v. Burbine, 451 A.2d 22, 35 (R.I. 1982)	2
State Farm Mutual Automobile Insurance Company v. Duel, 324 U.S. 154 (1945)	6
United States v. Gouveia, ___ U.S. ___, 104 S.Ct. 2292, 81 L.Ed.2d 146 (1984)	4
UNITED STATES CONSTITUTION	
Fifth Amendment to the United States Constitution	3
Sixth Amendment to the United States Constitution	3,4,5
STATUTES	
Florida Statutes (1981) Section 921.141	7

ARGUMENT

In his Brief in Opposition, Respondent argues that certiorari should not be granted for three reasons: the instant case is not legally or factually like either Miranda v. Arizona, 384 U.S. 436 (1966) or Burbine v. Moran, 753 F.2d 178 (1st Cir. 1985) cert. granted Moran v. Burbine, ___ U.S. ___, 105 S.Ct. 2319, 85 L.Ed.2d 838 (1985); that a new trial is also required in the instant case because the prosecutor made an impermissible reference to appellate review; and that the Florida Supreme Court properly considered and rejected the doctrine of harmless error in the instant case. Petitioner's submits that none of Petitioner's arguments detracts from the reasons presented in the petition for granting the

writ of certiorari, for none has merit.

Respondent attempts to persuade this Court that the present petition does not involve the same issue as in Burbine v. Moran, supra. Respondent seems to overlook the fact that the Supreme Court of Florida specifically relied on the dissenting opinion in State v. Burbine, 451 A.2d 22, 35 (R.I. 1982)(Bevilacqua, C.J., dissenting) to hold that the failure of the police to tell the Respondent that the attorney retained by his sister on his behalf was in the station house requesting to speak with him, violated Respondent's otherwise valid waiver of his rights. (A. 9).[1/] As stated in its Petition, there is

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[1/] Petitioner will again refer to its appendix by the letter "A", and will also refer to Respondent's appendix by the letters "RA."

little question that the Supreme Court of Florida's interpretation of the requirements of Miranda and the Fifth Amendment, as set out in its opinion in the instant case is in conflict with other decisions of state courts of last resort.

Petitioner would further submit that despite Respondent's attempt to show otherwise, the instant case does not involve the Sixth Amendment's right to counsel. The Constitution does not guarantee that a criminal suspect is entitled to the assistance of counsel during all encounters with the police in which investigation of crime is the primary police motive. Rather, the Sixth Amendment guarantees the assistance of counsel only after adversarial proceedings have commenced

against the suspect, whether by way of formal charge, preliminary hearing, indictment, information, or arraignment. Brewer v. Williams, 430 U.S. 387, 398, (1977). In United States v. Gouveia, ___ U.S. ___, 104 S.Ct. 2292, 81 L.Ed.2d 146 (1984), this Court reaffirmed "that the right to counsel attaches only at or after the initiation of adversary judicial proceedings against the defendant." Id. at ___, 104 S.Ct. at 2297. The instant case is clearly distinguishable from Escobedo v. Illinois, 378 U.S. 478 (1964) in which the defendant invoked his Miranda rights, by requesting counsel. Respondent in the present case never requested to speak with counsel. Thus, there is clearly no Sixth Amendment violation present in

the instant petition.[2/]

Respondent further argues that this Court should refuse to grant the petition because this Court should approve the order granting a new trial because of an alleged error in the prosecutor's comment during voir dire concerning their function in the sentencing process. Petitioner submits that Respondent's position is unsupported.

First, it must noted that the Supreme Court of Florida never addressed this issue. It is well established that when the state court has not passed on the question, this Court may not do so. See Illinois v. Gates,

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[2/] It should also be noted that the Supreme Court of Florida did not address the issue in Sixth Amendment terms.

462 U.S. 213, 218-223 (1983); Exxon Corporation v. Eagerton, 462 U.S. 176, 181 n. 3 (1983); Carter v. Kentucky 450 U.S. 288, 304 (1981); Sandstrom v. Montana, 442 U.S. 510, 527 (1979); State Farm Mutual Automobile Insurance Company v. Duel, 324 U.S 154, 160 (1945).[3/] Secondly, this Court should review the issue of the admissibility of the statement because if there is a retrial ordered for any other reason, the State must know whether it can properly introduce those statements as evidence in its case in chief. Thus, any issue as to the prosecutor's comment in the present case, presents no reason for

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[3/] Thus, this Court cannot even consider if the decision would rest on independent state grounds concerning the prosecutor's comment.

this Court to deny review.[4/]

As to Respondent's third argument in opposition to review, Petitioner would reassert its position that the Supreme Court of Florida failed to not only consider, but to properly apply, the harmless beyond a reasonable doubt standard on the introduction of Respondent's tape recorded statements

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[4/] Respondent's argument is also without merit. The prosecutor in the present case simply informed the prospective jurors what the sentencing process in capital cases entailed in Florida, including that the trial judge was the ultimate sentencer, and that the appellate court reviewed the sentence. (RA. 25). This was a correct statement of the law. Section 921.141, Florida Statutes (1981). This Court's decision in Caldwell v. Mississippi, 472 U.S. ___, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985) is inapplicable because in Mississippi, unlike Florida, the jury was the ultimate sentencer, subject only to appellate review.

to the facts in the present case. Such failure conflicts with this Court's opinion in Milton v. Wainwright, 407 U.S. 371 (1972).

CONCLUSION

Clearly, Respondent has not advanced any meritorious reason for this Court to deny the petition for writ of certiorari. Thus, because there is a solid jurisdiction basis upon which to grant review as well as the presence of substantial questions of federal law, Petitioner submits that the instant Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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